JURISDICTIONAL STATEMENT.

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. C. A., Title 28, Sec. 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is February 1, 1943 (R. 276); petition for rehearing was filed February 20, 1943, within the time prescribed by the Rules of the Fifth Circuit Court of Appeals (R. 277); the petition for rehearing was denied without opinion March 12th, 1943 (R. 320); motion to stay the mandate was filed March 17, 1943 (R. 320); on March 17, 1943, the issuance of the mandate was ordered stayed for thirty days from said date, which is the date of the entry of the last order in the Circuit Court of Appeals for the Fifth Circuit (R. 322).

3. Petitioners invoke the jurisdiction of this Court on these grounds: (a) That in construing Articles 2317 and 2320, La. Rev. Civ. Code, so as to permit recovery against a newspaper publisher for the torts of its carrier only when the publisher might have prevented but did not prevent the act, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, conflicts with applicable decisions of this Court, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A., Sec. 725; (b) That in failing to follow the most recent decisions of the Louisiana Courts of Appeals on the subject of the liability of a newspaper publisher for the torts of its carrier, the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way which conflicts with the applicable local decisions, and conflicts with Section 34 of the Judiciary Act of (September 24) 1789, 1 Stat. at L. 92, Ch. 20, 28 U. S. C. A.,

Sec. 725; (c) That in failing to follow the most recent decisions of the Louisiana Courts of Appeals on the liability of a newspaper publisher for the torts of its carrier, the Fifth Circuit Court of Appeals has rendered a decision conflicting with the decisions of this Court and with the decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals which hold that, where coordinate decisions of state courts are conflicting, the Federal Courts are bound to accept the latest decision as determining the state law; (d) That the opinion of the Fifth Circuit Court of Appeals in the case at bar conflicts with a decision of the Tenth Circuit Court of Appeals; (e) That in finding against the petitioners in whose favor a jury verdict has been rendered in the District Court, the Circuit Court of Appeals deprived your petitioners of the right to trial by jury as guaranteed to them by the Seventh Amendment to the Constitution of the United States, thereby deciding a federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court holding that no finding of fact made by a jury in a law case upon substantial evidence can be re-examined by the Judge or Judges of a Federal Court.

QUESTIONS PRESENTED.

The following questions are presented in the case at bar, in which the local jurisprudence was applicable since jurisdiction of the District Court rested on diversity of citizenship:

1. In formulating and applying its own construction of Arts. 2317 and 2320, La. Rev. Civ. Code, without regard to the settled jurisprudence of Louisiana (which holds that the apparent limitation of the tort liability of an employer which is suggested by said Articles does not exist at all), did the Fifth Circuit Court of Appeals err

in determining, for itself, that by virtue of the said Articles a limitation on liability of an employer did exist?

2. In failing to follow the most recent decisions of the Louisiana Courts of Appeals dealing with the liability of corporate newspaper publishers for the torts of their carriers [*Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing (La. App., 1939) 191 So. 713, cert. granted by the Louisiana Supreme Court (Appendix page 25), certiorari vacated by stipulation of compromise (Appendix page 26)], and in holding the evidence insufficient for the jury did the Fifth Circuit Court of Appeals decide an important question of local law in a way which probably conflicts with the Jurisprudence of Louisiana contrary to Section 34 of the Judiciary Act of 1789.

3. In failing to follow and apply the most recent Louisiana Courts of Appeals decisions on the identical question involved (namely, the liability of a corporate newspaper publisher for torts of its carrier), and in applying general law deduced from general statements in Louisiana cases involving different fact situations and supported by cases from foreign jurisdictions and common law text references, did the Fifth Circuit Court of Appeals fail to ascertain and apply the applicable state law in violation of the doctrine announced by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, *West* v. *American Telephone and Telegraph Company*, 311 U. S. 223, *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, and other decisions of this Court?

4. Where there are decisions of the Courts of Appeals of Louisiana on the identical factual and legal issues involved, may the United States Circuit Court of Appeals disregard these decisions and decide the case on the basis of general statements of general law deduced by it from an earlier case of the Louisiana Supreme Court

which involved an entirely different factual issue, and by so doing arrive at a conclusion contrary to that announced by the Louisiana Courts of Appeals?

5. In failing to follow the most recent decisions of the Louisiana Courts of Appeals (dealing with the liability of corporate newspaper publishers for torts of their carriers) did the Fifth Circuit Court of Appeals fail to ascertain and apply the existing local law and in this respect render a decision in conflict with decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals holding that the Federal Courts *must* accept the most recent state court decisions as establishing the local state law?

6. In refusing to hold that the listing in the insurance policy schedule of the alleged servant as a "class 1 employee" made a jury case under the circumstances, did the Fifth Circuit Court of Appeals err and render a decision in conflict with the decision of the Tenth Circuit Court of Appeals in *Ryan-Richards, Inc.*, v. *Whitesides*, (1938) 96 F. 2d 826?

7. In reversing the judgment of the District Court based on a jury verdict for petitioners did the Fifth Circuit Court of Appeals deny to petitioners the right to trial by jury guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Your petitioners are deeply aggrieved by the action of the Fifth Circuit Court of Appeals, in reversing the substantial judgments based on jury verdicts in their favor for severe personal injuries. Your petitioners submit that the Circuit Court of Appeals, consisting of judges unversed and untrained in the learning and application of

the Louisiana Civil Code and in the jurisprudence of Louisiana not only substituted their judgment for that of the jury but also rendered a decision contrary to the Louisiana Civil Code and to the applicable jurisprudence of Louisiana; that in so doing, they violated federal rules of law established by the decisions of this Court and of other Circuit Courts of Appeals based upon the statutes and Constitution of the United States. Petitioners request this Court to note that the three circuit court judges who decided his cause are all from states other than Louisiana. Judge Hutcheson, who wrote the opinion, came to the Circuit Court of Appeals from Texas. In the decision of the case at bar, Judge Hutcheson relied heavily upon Texas cases which do not agree with the jurisprudence of Louisiana. Judges Holmes and Sibley who concurred in the judgment are from Mississippi and Georgia, respectively.

District Judge Adrian J. Caillouet of Louisiana, who is versed in the theory and application of the Louisiana Civil Code and in the jurisprudence of Louisiana by training and experience, held that a jury case had been made and rendered the judgment based on Louisiana jurisprudence which was reversed by the Circuit Court of Appeals.

Petitioners feel that there are cogent reasons recognized by the rules and decisions of this Court why this petition for certiorari should be granted and the judgment of the Circuit Court of Appeals reviewed. The reasons relied upon follow:

1. The Circuit Court of Appeals decided an important question of local law involving construction of the Civil Code of Louisiana in a way which probably conflicts with the jurisprudence of Louisiana in this: To justify its judgment, the Circuit Court of Appeals below cited Arts. 2317 and 2320, La. Rev. Civ. Code, reading as follows:

> "2317. (2296) (N. 1382). Liability as *Respondeat Superior*—Things in Custody.—We are responsible not only for the damage occasioned by our own act,

but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

"2320. (2299) (N 1384). Masters, Teachers and Artisans—Liability.—Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. Teachers and Artisans are answerable for the damage caused by the scholars or apprentices while under their superintendance. In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage and have not done it."

The Circuit Court of Appeals construed Article 2320 to render a master or employer liable under the doctrine of *respondeat superior* only when the master or employer "might have prevented but did not prevent the act which caused the danger." This construction, applying the apparent limitation of the tort liability of a corporate employer, suggested by the last sentence of Article 2320 of the Louisiana Civil Code, quoted above, is directly contrary to the jurisprudence of Louisiana. The Louisiana courts have specifically and unqualifiedly held that this apparent limitation on the liability of the employer suggested by Article 2320 of the Civil Code does not exist at all. *Ragas* v. *Douglas*, (La. Sup., 1916) 139 La. 773, 72 So. 242; *Weaver* v. *W. L. Goulden Logging Co.*, (La. Sup., 1906) 116 La. 468, 40 So. 798.

In the *Ragas case, supra*, the Louisiana Supreme Court ruled directly contrary to the construction given the Code by the Circuit Court of Appeals below, saying, at page 774 of 139 La.:

"It is conceded to be the settled jurisprudence of this court, with respect to corporations and partnerships, that, construing article 2320 of the Civil Code as a whole, the last paragraph, which purports

> to limit the liability of masters and employers (as imposed by the first paragraph) for damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed, to cases in which they 'might have prevented the act which caused the damage, and have not done it,' *does not operate to effect that limitation*" (Italics ours).

In the *Weaver case, supra,* the Supreme Court of Louisiana had previously made the same ruling, saying, at page 473 of 116 La.:

> "It therefore may be said that the restriction on the liability of masters embodied in article 2320 (2299) of the Civil Code *has been construed out of the text,* for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article" (Italics ours).

It is apparent then that the Circuit Court of Appeals below has decided an important question of construction of this Article of the Louisiana Code in a manner which is not only probably in conflict with the jurisprudence of Louisiana but is patently in conflict therewith. Such action of the Circuit Court of Appeals, of course, is a violation of Section 34 of the Judiciary Act of 1789 and the decisions of this Court rendered pursuant thereto. *Moore* v. *Illinois Central Railroad Co.,* (1941) 312 U. S. 630, 85 L. Ed. 1089.

2. The Circuit Court of Appeals below decided an important question of local law in a way which probably conflicts with the applicable jurisprudence of Louisiana in this: The question was whether a corporate newspaper publisher was liable for the torts of a motor carrier delivering its papers on a specified route under an oral agreement terminable at the will of the publisher. The question had never been passed upon by the Supreme Court of Louisiana but had been before the Louisiana Courts of Appeals in 1936 and in 1939 in the cases of *Ravare* v. *McCormick & Co.,* (La. App., 1936) 166 So. 183,

and *Gallaher* v. *Ricketts*, (La. App., 1939), 187 So. 351, reversed on rehearing on other grounds (La. App., 1939), 191 So. 713, certiorari granted Louisiana Supreme Court and vacated by stipulation of compromise (Appendix pages 25-26).

In both the Ravare case and the Gallaher case, the corporate publisher was held to be liable upon facts practically identical to those in the case at bar. The Circuit Court of Appeals below refused to apply the rule of these cases and held the evidence to be insufficient to take the case to the jury. To justify this conclusion the Circuit Court of Appeals cited twelve cases (only three of which were from Louisiana), and a fragment of the text and comment of the Restatement of the Law of Agency. Specifically the Circuit Court of Appeals relied upon a general statement defining the term "independent contractor" found in the Louisiana case of *Robideaux* v. *Hebert*, (1907) 118 La. 1089, 43 So. 887, a case involving the liability of a railroad for the acts of an independent contractor engaged by a railroad in the movement of earth to make a "fill." The above-mentioned Louisiana Courts of Appeals cases on the precise point were disposed of without being named or discussed in the opinion, in two sentences as follows:

> "The Louisiana Court of Appeals cases, on which appellees rely, are not in conflict with the settled Louisiana rule. Their facts completely distinguish them from the case at bar."

Petitioners submit that in failing to apply the rule of these cases the Circuit Court of Appeals below has decided an important question of local law in a way which probably conflicts with the jurisprudence of Louisiana.

3. The action of the Circuit Court of Appeals below in disregarding the last controlling opinions of the Courts of Appeals of Louisiana, dealing with the tort liability of a corporate newspaper publisher for the acts of

its motor carriers, and in applying general law contrary thereto deduced from general statements in Louisiana cases involving different fact situations, from cases from foreign jurisdictions and from common law text references, constitutes a failure to ascertain and apply the applicable jurisprudence of Louisiana in violation of the decisions of this Court in *Stoner* v. *New York Life Insurance Company*, 311 U. S. 464; *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway District No. 13 of California*, 311 U. S. 180; and *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169. These cases require the Federal Courts, in diversity of citizenship cases, to apply the state law as declared by intermediate courts of appeals in the absence of a decision on the point involved by the Supreme Court of the state. The judgment of the Circuit Court of Appeals below is in conflict with the doctrine and rule of law announced by these decisions of this Court.

4. There were decisions of the Courts of Appeals of Louisiana upon the identical factual and legal issues involved in the case at bar (namely, the liability of a corporate newspaper publisher for the torts of its carrier), *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351 reversed on rehearing (La. App., 1939), 191 So. 713, cert. granted by the Louisiana Supreme Court (Appendix page 25), cert. vacated by stipulation of compromise (Appendix page 26). In purporting to determine the jurisprudence of Louisiana, the Circuit Court of Appeals below ignored these applicable decisions and decided the case on the basis of general statements extracted from a case of the Louisiana Supreme Court which dealt with an independent contractor building a fill for a railroad company. *Robideaux* v. *Hebert*, (1907) 118 La. 1089, 43 So. 88, decided 29 years prior to the *Ravare case, supra*, and 32 years prior to the *Gallaher case, supra*.

Petitioners submit that this action of the Circuit Court of Appeals below indicates that it decided an important question of local law in a way which probably conflicts with the jurisprudence of Louisiana and constitutes the decision of an important Federal question in a way which conflicts with the applicable decisions of this Court and with Section 34 of the Judiciary Act of 1789. *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

In *West* v. *American Telephone and Telegraph Co.*, *supra*, the controlling Federal rule of decision with respect to the force of cases of intermediate appellate courts of a state was stated as follows (311 U. S., l. c. 237):

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a Federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

The decisions of this Court do not require that the decision of the intermediate state appellate court required to be followed must have been rendered in a controversy between the same parties who are later in the Federal Court. *Six Companies of California* v. *Joint Highway District No. 13 of California*, 311 U. S. 180; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169.

5. The Circuit Court of Appeals below rendered a decision in conflict with decisions of the Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals in this: The Fourth, Seventh, Eighth and Ninth Circuit Courts of Appeals have held that, in determining the applicable local law, the most recent pronouncement of the state courts *must* be accepted by the Federal Courts as declaring the

law of the state where coordinate decisions of a state's courts are conflicting or are assumed to conflict.

Fourth Circuit:	*Dayton & Michigan R. Co.* v. *Commissioner of Internal Revenue,* (1940) 112 F. 2d 627, l. c. 630;
Seventh Circuit:	*Alexander* v. *Missouri State Life Ins. Co.,* (1933) 68 F. 2d 1, l. c. 3;
Eighth Circuit:	*Yoder* v. *Nu-Enamel Corporation,* (1941) 117 F. 2d 488, l. c. 490;
Ninth Circuit:	*Toole County Irr. Dist.* v. *Moody,* (1942) 125 F. 2d 498, l. c. 501.

In the case at bar the Fifth Circuit Court of Appeals chose to follow its interpretation of an earlier decision of the Louisiana Court of Appeals dealing with the liability of a newspaper publisher for the torts of its carriers. *Abate* v. *Hirdes,* (1929) 9 La. App. 688, 121 So. 775. If the Abate case is assumed to conflict with the later Courts of Appeals cases on the same subject, it is the duty of the Federal Court to follow the later cases. *Ravare* v. *McCormick & Co.,* (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts,* (La. App., 1939) 187 So. 351, reversed on rehearing on other grounds (La. App., 1939) 191 So. 713, cert. granted Louisiana Supreme Court (See Appendix page 25) writ vacated by stipulation of compromise February 5, 1940 (See Appendix page 26).

The evidence in the recorded opinions indicates that the Fifth Circuit Court of Appeals has formulated, and follows, a rule of decision that it need not apply the most recent state court decision. Thus the Fifth Circuit Court of Appeals has previously taken the position that the Federal Courts need not follow the most recent coordinate decision dealing with the problem but may follow whatever decision the Federal Court considers to be a correct

statement of the law. See *Sabine Lumber Co.* v. *Broderick*, (1937) 88 F. 2d 586, l. c. 588. There, in the course of passing upon a case in which conflicting Louisiana decisions had been cited by opposing counsel, it was said:

> "Undoubtedly, expressions in the cases above mentioned tend to support the contentions of the parties citing them. Considering the conflict in the Louisiana jurisprudence, the District Court was entitled to follow the decisions he considered correctly stated the law."

Whether the Federal Courts must follow the most recent pronouncements of coordinate state courts is a federal question of importance upon which the decisions of the Fifth Circuit Court of Appeals conflict with the decisions of the Fourth, Seventh, Eighth and Ninth Circuits.

6. The Circuit Court of Appeals below rendered a decision in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Ryan-Richards, Inc.*, v. *Whitesides*, (Okla., 1938) 96 F. 2d 826, in this: In the case at bar the motor carrier, for whose acts petitioners sought to hold the publisher and its insurer liable, was listed in the automobile liability insurance policy as a "Class 1 employee" which was defined as follows:

> "Class 1 consists of the following persons provided their usual duties in the business of the named assured include the use of automobiles as described in Par. 1: (a) all employees including officers of the named assured compensated for the use of such automobiles by salary, commission, terms of employment or specific operating allowance of any sort; (b) all direct agents or representatives of the named assured" (R. 80).

The Circuit Court of Appeals below held that the admission embodied in this evidence was not sufficient to take the case to the jury. This is directly contrary to the holding of the Tenth Circuit Court of Appeals in the *Ryan-*

Richards case, supra, where a substantially identical question was presented and the Tenth Circuit Court of Appeals held the evidence sufficient to take the case to the jury, saying (96 F. 2d 826, l. c. 835):

> "In the instant case the 'contractor,' in a written report made to the Highway Commission, sworn to, stated that the 'truck driver' was its employee. This is direct evidence to be considered in connection with all the circumstances. True, the 'contractor' and its codefendant, the 'truck driver,' seek to explain this admission in writing, but that, under the evidence in the record, is a question for the determination by the jury as to independent contractor *vel non.*"

In Louisiana jurisprudence, as in Oklahoma, the word "employee" is understood and used to describe one for whose torts the employer is liable and it excludes one who is an independent contractor for whose torts the other contracting party is not liable. See *Jones* v. *Shehee Ford Wagon and Harness Co., Inc.,* (La. App., 1934) 163 So. 129, l. c. 132, where it is said:

> "The evidence on the subject is conclusive and undisputed that the driver of the Ford car was employed as a salesman for the Shehee-Ford Company, at a regular salary, and not on a commission basis, and that in the rendering of his services he was under the direction and control of his employer, and *was subject to discharge if he did not obey* the directions of his employer. *That means that he was not an independent contractor, but an employee*" (Italics ours).

The Circuit Court of Appeals below disregarded the meaning generally attached to the word "employee" and rendered a decision in the case at bar which is in conflict with the decision of the Tenth Circuit Court of Appeals cited above.

7. In reversing the judgment of the District Court based upon a jury verdict for petitioners, where there was

substantial evidence to support the verdict under the applicable Louisiana jurisprudence, the Fifth Circuit Court of Appeals substituted its judgment upon the fact for the finding of the jury, thereby denying to petitioners the right to trial by jury guaranteed to petitioners by the Seventh Amendment to the Constitution of the United States. *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464. In the Stoner case this Court in speaking of an analogous situation said (311 U. S. l. c. 468):

> "It is apparent, then, that the question of total disability, on the evidence before the court in those two cases, is a question for the jury under instructions embodying the test, the Kansas City Court of Appeals approved. Under the rule of the *West, Six Companies*, and *Field Cases, supra*, it was error for the Circuit Court of Appeals to hold, in effect, that the evidence would not support the finding of the trial judge that there was total disability, unless convincing evidence indicated that the Missouri Supreme Court would decide differently."

In view of the state of the jurisprudence of Louisiana, petitioners submit that they have been deprived of their constitutional right to trial by jury.

CONCLUSION.

Wherefore, for the reasons stated herein, it is respectfully submitted by petitioners that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; in order that the law may be properly and authoritatively settled; in order that justice may be done. And to such ends, the petitioners respectfully submit that a writ of certiorari should be granted and that this Court should

review the decision of the Circuit Court of Appeals for the Fifth Circuit and finally reverse it.

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